No. 9243

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, Appellant,

vs.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, H. B. HERSHEY, Receiver of Mississippi Valley Life Insurance Company, R. E. O'MALLEY and WILliam E. CAULFIELD, Receivers, J. G. VAUGHN, M. J. DOUGHERTY, GRACE V. ROWELL, Formerly Grace V. Wallace, WILLIAM H. WALLACE, a Minor, ANNA LOUISE WALLACE, a Minor, R. L. DANIEL, Chairman of the Board of the Insurance Commission of the State of Texas, Appellees.

ANSWERING BRIEF OF APPELLEES

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STATEMENT

Appellant's statement of pleadings and facts contains a recital of the allegations of the Bill of Complaint and of the points raised on appellees' motion

to dismiss. The statement correctly details the allegations of the complaint, but inasmuch as there was no trial upon the merits, the facts must be considered as alleged facts and not as proven facts.

Appellant has based his assignments of error on the points raised by appellees in their Motion to Dismiss the Bill of complaint, and we will, therefore, present our argument in the order of appellant's presentation. For the convenience of the Court, we will set the assignment up as a prefix to our argument on the assignment.

FIRST ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue.

ARGUMENT

Appellant asserts his right to maintain this suit by virtue of his appointment by the District Court of the County of Santa Fe, State of New Mexico, as Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico.

He also claims to be vested with title to securities deposited with the Superintendent of Insurance by the Mississippi Valley Life Insurance Company, now insolvent, as security for the payment of policyholders of the National Life Insurance Company of

the Southwest, by virtue of an assignment to him of said securities by the Superintendent of Insurance of the State of New Mexico.

The record does not show and the appellant does not claim, that he was Receiver of the Mississippi Valley Life Insurance Company, the owner of the securities deposited with the Superintendent of Insurance; he claims to be, and sues as Receiver of and for the Superintendent of Insurance.

Appellant is a Chancery Receiver appointed as such by a County Court of the State of New Mexico. As such he has no capacity or jurisdiction to sue in the Courts of Arizona, even though the Court appointing him attempted to confer that right upon him. The leading case on the subject, and one which is still recognized as authority, is *Booth vs. Clark, 17 Howard (U. S.), 322*, where it is held that a receiver is an officer of the Court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of foreign jurisdiction, upon the order of the court which appoints him, to recover the property of the debtor.

On page 22 of his brief appellant asserts that practically unanimous are the decisions that hold that foreign chancery receivers have the right to sue in a foreign state if no rights of citizens of that state are

involved. In support of this assertion the following Federal decisions are cited: *Ashcroft vs. Bream (Penn.), 51 Fed. (2d) 301; Good vs. Deer (Wis.), 46 Fed. (2d) 411,* and *Seested vs. Bonfils (Colo.), 33 Fed. (2d) 185.* These cases show the rule, at least in the Federal Courts, to be contrary to the appellant's contention.

In the *Ashcroft* case the Court states:

> "As to the jurisdiction of this court to entertain the action. A receiver appointed by a court of one state or jurisdiction cannot maintain a suit in another state or in another jurisdiction; he is confined to the jurisdiction of the court which appoints him."

In the *Good* case the Court says:

> "It is settled law of the federal courts that a chancery receiver has no title to the property in his possession, and he has no power whatever to maintain an action in a state other than that in which his appointment is made. He is strictly a creature of the court which appointed him, and his jurisdiction cannot exceed that of the court which created him."

And in the *Seested* case:

> "Speaking generally, the rule in the federal court is that a receiver appointed by a court of

> chancery has no legal status outside the territorial jurisdiction of the court appointing him, but, by comity, the authority of receivers appointed in one state is often recognized by courts of another state, within whose jurisdiction they may seek to exercise their powers * * *. The question is becoming more and more one of discretion rather than jurisdiction."

A recent decision of the Circuit Court of Appeals, for the Ninth Circuit, following the doctrine announced in *Booth vs. Clark, supra,* is found in *Oakes vs. Lake, 67 Fed. (2d) 728,* and affirmed as to the doctrine by the United States Supreme Court in *Oakes vs. Lake, 290 U. S. 59, 78 L. Ed. 168.* While the rule in most of the State Courts follow the Federal rule, some of them hold that a Chancery Receiver may sue in a foreign State by comity. But even in these States the holding is practically unanimous that a Chancery Receiver cannot sue in a foreign jurisdiction as a matter of right, but only by comity. Such is the ruling in the cases from State courts cited by appellant.

Appellant states on page 22 of his Opening Brief that he presented a petition in the lower Court praying for leave to sue. An unsigned, undated and unverified petition is set out in the Transcript on pages 3 to 11, inclusive, but nowhere in the record does it show that leave to sue was granted by the Court. We know of no such leave having been granted. Even if leave to sue had been granted by the Court, the granting of such leave would not be conclusive; *53*

C. J. 342, Sec. 554. The Court had the authority to dismiss upon the ground that permission to sue was not granted in the first instance, or if granted, it was improvidently granted.

Appellant again contends that even if he did not have the right or permission to sue by virtue of his appointment as a Chancery Receiver, he has title to the securities sued on and therefore may sue as trustee of an express trust without the consent of the Arizona Court. The appointment of appellant as Receiver of and for the Superintendent of Insurance did not purport to, and could not, vest title to the securities in him. Appellant claims that the Superintendent held the securities as trustee for the holders of registered policies of the National Life Insurance Company of the Southwest. If he was trustee of these securities, the Court had no power to take the property out of his hands and appoint a receiver, except upon proof of misconduct or other causes which justify his removal; *Perry on Trusts and Trustees, 7th Ed., Sec. 594, page 1007; Chicago T. & T. Co. vs. Zinser (Ill.), 105 N. E. 718.*

Nor could the Superistendent of Insurance assign or delegate his trust to the Receiver:

> "The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust."

Perry on Trusts & Trustees, 7th Ed., Sec. 287, Page 508.

In the case of *Seely vs. Hill 49 Wis. 473*, 5 N. W. 940, a bond was given to the president of a bank and his successors in office, as trustee, to pay past indebtedness of the bank. The bank subsequently became financially embarrassed and made an assignment to one, Dodge, for the benefit of creditors. After the assignment the president assigned the bond to Dodge. The Court stated that the bond might or might not go to the assignee, Dodge, as a part of the securities for the outstanding indebtedness of the bank, but holds:

> "The law, however, is very clear, that the office and duties of a trustee being a matter of confidence, cannot be delegated by him to another, unless an express authority for that purpose be conferred on him by the instrument creating the trust.
>
> "This principle is elementary, and has only one exception, and that is where the trustee delegates the trust to another, with the consent of the sestui que trust, and all other parties interested in the trust."

Assuming, for the purpose of this argument, that the County Court of Santa Fe, New Mexico, had a right to appoint appellant Receiver over the securities which had been assigned to the State of New

Mexico, the attempted assignment of the securities by the Superintendent of Insurance adds nothing to appellant's authority to sue thereon. If the Court of New Mexico had authority to appoint appellant Receiver over the scurities, such appointment would not invest appellant with title to the securities and he could not sue thereon as an owner.

We do not question that a Statutory Receiver who acquires title by virtue of a statute, may ordinarily sue in a foreign jurisdiction, or that a trustee of an express trust may sue in his own name. Such is the holding in *Relf vs. Rundle, 103 U. S. 222*, and *Bernheimer vs. Converse, 206 U. S. 516*, cited by appellant. We contend, however, that the record does not show appellant to be either a statutory receiver, an owner, or a trustee of an express trust.

The cases of *Holloway vs. Federal R. L. Ins. Co., 21 Fed. Supp. 516*, and *Hobbs vs. Occidental Life Ins. Co., 87 Fed. (2d) 380*, cited by appellant do not support his contention. In these cases the Court does not hold that a receiver of the Superintendent of Insurance has a right to the securities, but that the Liquidating Receiver of the insolvent corporation has the right to administer them.

As we interpret the Statutes of New Mexico, by authority of which the securities were deposited (Exhibit A, Tr. 48; Exhibit D, Tr. 54) the Superintendent of Insurance was a mere depositary of the securities. And as we interpret the assignment of securi-

ties by the Mississippi Valley Life Insurance Company (Exhibit J, Tr. 74), which was the only assignment is force after the reinsurance agreement by which the Mississippi Valley Life Insurance Company took over the assets of the Two Republics Life Insurance Company and assumed all outstanding policies, including those of the National Life Insurance Company of the Southwest, the only authority the Superintendent had over the securities was to hold them and in case they were about to become barred by statute, or doubtful as to sufficiency, to tender them back to the assignee and require other securities to be deposited in lieu thereof.

SECOND ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered.

ARGUMENT

Appellant does not allege in his complaint what amounts or that any amounts are due to the policyholders of the National Life Insurance Company of the Southwest, for whose benefit the alleged securities sought to be foreclosed were assigned to the State

of New Mexico. We know of no rule which permits the foreclosure of a mortgage or other securities unless there is some certain sum due, or to become due, to the beneficiaries for whose benefit the mortgage or deposit of securities was made. The complaint, in order to state a cause of action, must state that there are policyholders in existence who are entitled to be paid out of the securities and the amount that the securities are obligated for. The complaint in the instant case does neither.

The case of *Coambs vs. Central Health & Accident Securities Co., 207 Ill. App. 396*, is exactly in point. In that case suit was brought to foreclose certain securities deposited with the Superintendent of Insurance of the State of Illinois for the benefit of policyholders. The policies had been reinsured by the defendant company as have the policies of the National Life Insurance Company of the Southwest by the appellee, Republic Life Insurance Company of Dallas, Texas, in the instant case; the Court says:

> "Presumably, through these reinsurance contracts the Royal was relieved of all liability, and the fact that no policyholder has intervened in this suit strongly indicates that there is no outstanding liability.
>
> "We think that it was for the superintendent to show the existence of bona fide policyholders having liens, if any such there were."

The court then quotes with approval from *Falkenback vs. Patterson, 43 Ohio 359, 1 N. E. 757,* as follows:

> "An action was brought by the receiver of a life insurance company organized under the laws of Ohio to foreclose notes and mortgages which had been deposited with the superintendent of insurance of that state, under a statute with a similar provision with the one at bar.
>
> "The supreme court, reversing a decree of foreclosure entered below and while holding that the makers of the notes and mortgages were estopped as to policyholders of the company, says:
>
> > 'But what, if anything, is due in this case to policyholders? There is no finding or evidence in the record from which we can ascertain any specific sum. The court finds that the liabilities of said company to policyholders and general creditors amount to $35,000 or more; * * *.
> >
> > 'It may be that no policyholder has a claim secured by these deposits. Before these mortgages can be foreclosed there must be shown some *specific amount due, or that may become due,* on account of such policyholders, *and that such amount is a claim against this specific deposit.*' "

In *Seely vs. Hills (Wis.), 5 N. W. 940,* the Court was passing on a complaint which failed to state who were entitled to participate in a bond deposited for security or the amount of the liability to the beneficiaries thereunder. The Court at Page 941 says:

> "What was the character of this past due indebtedness which the obligers really assumed to pay? What were the several amounts constituting it, and who were the several creditors of the bank to whom it was due and payable? What was the nominal value of the assets, and what were realized out of them to be applied to their payment? In what respect and particulars, and how, are these obligors in default, and in what specific sum? These are the material and important questions in this case, *and they are all unanswered by the complaint.* Does the plaintiff know these facts, or have information of them? If not, he has no right to complain, and shows no ground of action. A complaint for specific relief, or for recovery, must state some facts which show the default and liability of the defendant, and this complaint states no such facts."

Appellant contends that neither liability nor the amount of liability need be stated in the complaint because the order of Judge Chavez of the County Court of Santa Fe County, New Mexico, is conclusive. The order of Judge Chavez could not be conclusive against the appellees because they were not

parties to the action in which the order was made. The cases cited by appellant have to do with stock assessments. There is no similarity between liability on a stock assessment and liability under a deposit for security.

The stockholders' liability for an assessment is a statutory liability, and the assessment and collection is controlled by statute; *Bernheimer vs. Converse, 206 U. S. 516, at page 529, 51 L. Ed. 1163.*

But even in the case of a stockholders' assessment, the amount must be determined by the Court or Comptroller, before the assessment becomes conclusive.

> " * * * the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation, and the necessity of making an assessment upon the stock *to the extent and in the amount ordered.*"
>
> *Bernheimer vs. Converse, supra, at page 528.*

SEE ALSO: *Kennedy vs. Gibson, 8 Wall. (U. S.) 498, at Page 505; 19 Law Ed. 476;*

Casey vs. Galli, 94 U. S. 673, at Page 677, 24 Law Ed. 307.

Judge Chavez, in his order (Tr. 50) did not determine and fix the amount of the liability against the securities by reason of claims filed or to be filed with the Receiver, and in fact did not specify that any claims had been filed or were to be filed by the

policyholders of the National Life Insurance Company of the Southwest, the parties for whose security the deposits were made.

The liability under the policies of the National Life Insurance Company of the Southwest had been assumed by the appellee, Republic Life Insurance Company of Dallas, Texas, under the agreement between that Company and the Receivers of the Mississippi Valley Life Insurance Company, dated May 18, 1932 (Tr. 77-83). By this agreement there was a novation of liability by which the Republic Life Insurance Company of Dallas, Texas, assumed the liability of the Mississippi Valley Life Insurance Company as to the policies of the National Life Insurance Company of the Southwest; *Hobbs vs. Occidental Life Insurance Co., 87 Fed. (2d) 380.* If the Republic Life Insurance Company of Dallas, Texas, had defaulted under its assumption and reinsurance agreement, the complaint should state the amount of such default and the parties who have suffered by the default.

Again the complaint does not allege what, or if anything, was due from the Wallaces under the executory contract which is sought to be foreclosed.

THIRD ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for

the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof.

ARGUMENT

Paragraph XVI of the amended complaint (Tr. 37) alleges that on the 18th day of May, 1932 the Receivers of the Mississippi Valley Life Insurance Company entered into a contract with the appellee, Republic Life Insurance Company of Dallas, Texas, by which appellee agreed to assume the policy obligations of the Mississippi Valley Life Insurance Company, including the registered policies issued by the National Life Insurance Company of the Southwest. The agreement referred to is attached to the complaint and marked "Exhibit K" (Tr. 77).

Section 3 of the agreement (Tr. 79) contains the following clause:

> "On all policies which are secured by deposit with the Insurance Department of the State of New Mexico the party of the first part shall be entitled to receive from said Insurance Department of the State of New Mexico, securities now on deposit to the value of the reserve of the policies on which said party of the first part assumes liability hereunder and the policyholders

> accept such assumption, and said party of the first part shall, with the consent of the Insurance Department of the State of New Mexico be entitled to have said reserves credited to it in such manner as the Insurance Department of the State of New Mexico shall approve and said Alvin S. Keys, Receiver, shall be entitled to the reserves on deposit with the said Insurance Department of the State of New Mexico, in excess of the claims which are against said deposit."

Alvin S. Keys, mentioned in the agreement, was the Liquidating Receiver of the Mississippi Valley Life Insurance Company by appointment in the State of Illinois, the State in which said Mississippi Valley Life Insurance Company was incorporated.

In the case of *Hobbs vs. Occidental Life Ins. Co., supra.*, a situation was presented similar to the situation in the case at bar. There the Occidental Life Insurance Company of California assumed the obligations of the policies issued by the Federal Reserve Life Insurance Company of Kansas. In an action brought by the Occidental Life Insurance Company to obtain possession of securities held by the Insurance Commissioner of the State of Kansas as security for the policyholders of the Federal Reserve Life Insurance Company of Kansas, the Court ordered the Commissioner to turn the securities over to the Occidental Life Insurance Company. In passing upon the status of these securities, the Court says:

"The contention to which the commissioner devotes extended argument is that the reinsured policies are still in effect and will remain so until they are terminated by death, withdrawal of surrender value, or default in payment of premiums. As previously stated, the statutes in Kansas require the deposit of securities, authorize substitution and permit the withdrawal of excesses over policy liabilities. And in obedience to the mandate contained in Sec. 40-407, these policies each bear a certificate signed by the commissioner certifying that its security be a pledge of bonds or notes and mortgages on real estate deposited with the treasurer in an amount equal to the full legal reserve; but it does not follow from these provisions of the statutes and certificates that the policies are now in force, in the sense that the commissioner is required to retains the security. It is well settled that upon the adjudication of insolvency and the appointment of a receiver on May 22, the policies of the Federal Reserve were terminated as enforcible obligations for their respective face amounts, and the holders became creditors, each for an amount equal to the then value of his policy with the right to participate pro rata in the assets in receivership. * * * The privilege of participating in such assets was the only right which the holders had upon the adjudication of insolvency until the reinsurance agreement became effective."

As we view the situation here, the appellee, Republic Life Insurance Company of Dallas, Texas, owned the securities to the extent of the legal reserve of the policies of the Mississippi Valley Life Insurance Company, the Two Republics Life Insurance Company, and the National Life Insurance Company of the Southwest, assumed and reinsured by it, and that the overplus, if any there was, was to be turned over to the Liquidating Receiver of the Mississippi Valley Life Insurance Company. How the securities were to be administered is not stated in the reinsurance agreement, but it seems to us that is a matter entirely between the Republic Life Insurance Company and the Liquidating Receiver of the Mississippi Valley Life Insurance Company. The authority of the superintendent over the securities and his duties pertaining thereto had terminated.

In *Holloway vs. Federal Reserve Life Ins. Co. 21 Fed. Supp. 516, at Page 518* it is said:

> "A paramount question arises as to how the Superintendent of insurance can apply the securities now held by him. He is not an executive receiver; he is not authorized to liquidate the company; and moreover the Federal Reserve is no longer a going concern. It was his duty to hold securities while the company was doing business, and to do so, as trustee for policyholders in Missouri. * * *

> "The responsibility of the superintendent of insurance as an executive officer is completely discharged when a court, whose duty it is to administer the estate, calls for a surrender and delivery of such assets."

The fact, if it be a fact, that the policyholders of the National Life Insurance Company of the Southwest may have a preferred right to the securities here involved does not change the situation; for, as stated in *Holloway vs. Federal Reserve Life Ins. Co., supra:* at page 518:

> "Granted that such securities are impressed with a lien, the court must be trusted to hold a disposition to enforce such lien."

It will be noted in the Holloway case, that the Receiver to whom the securities were awarded was the Liquidating Receiver of the insolvent corporation; he was not, as in the case at bar, a Receiver of and for the Superintendent of Insurance, the holder of the deposit. Both the *Hobbs* and the *Holloway* cases hold that the Superintendent of Insurance, upon insolvency of the company which deposited the securities, lose all rights thereto and all authority to administer the same, and that his only remaining duty is to turn them over to the Liquidating Receiver of the insolvent insurance company, and that they are to be administered by the Liquidating Receiver, subject to any preferred lien of the policyholders for whose benefit such securities were deposited. This being the rule, the

Superintendent of insurance would have no power or authority to assign the securities to a receiver appointed solely for the administration of the securities.

It is contended by appellant that appellee, Republic Life Insurance Company of Dallas, Texas, had no right to the securities, notwithstanding the agreement "Exhibit K" entered into between it and the Liquidating Receivers of the Mississippi Valley Life Insurance Company, save and except under such terms as the Superintendent might impose. Under the rule laid down in the *Hobbs* and *Holloway* cases, the Liquidating Receivers of the Mississippi Valley Life Issurance Company had the right to administer these securities. The Receivers, under authority of the Court of the domicile of the corporation, turned them to the Republic Life Insurance Company of Dallas, Texas, in consideration of the assumption by the Republic Life Insurance Company of the outstanding policies of the National Life Insurance Company of the Southwest, to the value of the reserves of said policies. The right to receive the securities to the value of the reserves is positive. The manner of the application of credit of the reserves to it is the only thing left for the approval of the Superintendent of Insurance.

It is apparent from the complaint that, by reason of the reinsurance contract, some one in authority transferred the escrow contract upon which the suit at bar is based, to Republic Life Insurance Company, for it is alleged in Paragraph XVII of the Complaint

(Tr. 38) that "on August 22, 1932, one, E. H. Banta, claiming to be the owner of the lands aforesaid *by transfer of the escrow contract aforesaid, by Republic Life Insurance Company of Dallas, Texas.* " * * * commenced suit in the Superior Court of Maricopa County, Arizona, against A. O. Pelsue as Receiver of the Mississippi Valley Life Insurance Company * * * which resulted in a certain decree dated August 22, 1932 adjudging said Banta to be the owner in fee simple of the lands aforesaid and ordering said Receiver to execute to said Banta a deed therefor."

It is apparent from the above recital that the escrow contract was one of the muniments of title by which Banta established his title in fee simple in the Superior Court to the premises described in the escrow contract and involved in this suit. Inasmuch as the Court quieted title in Banta it must be presumed that satisfactory evidence was presented to the Court, not alone showing a proper transfer of the escrow contract to Banta by the Republic Life Insurance Company, but by a proper transfer from the proper authority to the Republic Life Insurance Company, his predecessor in ownership. After the entry of the decree quieting title in Banta, the Republic Life Insurance Company and Grace V. Rowell (formerly Wallace), individually and as Executrix of the Estate of James Q. Wallace, conveyed whatever interest they might have in the property to Banta (Tr. 39).

FOURTH ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed.

ARGUMENT

The alleged securities which appellant seeks to have decreed to be an equitable lien upon the lands described in the complaint (Paragraph VII, Tr. 30), and which he seeks to foreclose, consist of an escrow of an executory contract of sale and reciprocal deeds between the Two Republics Life Insurance Company as vendor and James Q. Wallace and Grace V. Wallace as vendees.

After alleging the execution and escrow of the contract and the warranty deed from the Two Republics Life Insurance Company to the Wallaces, and the quit-claim deed from the Wallaces back to the Two Republics Life Insurance Company, the complaint recites (Tr. 32):

> "And it was provided by said executory contract that upon performance of the terms and

> conditions of said contract by the said Wallaces to be performed, said Salt River Valley Trust and Savings Bank, escrow holder aforesaid, should deliver to said Wallaces the warranty deed aforesaid; and it was further provided that if said Wallaces should make default in the terms and conditions of said contract by them to be performed, said escrow holder should return to said Two Republics Life Insurance Company the warranty deed aforesaid, and to deliver to said Two Republics Life Insurance Company the quit-claim deed aforesaid.

The escrow contract is in the form customarily used in Arizona and many of the western states for many years, and is nothing more than an agreement to convey if and when the purchase price has been paid in accordance with the terms of the agreement, and is forfeitable for default in making the payments.

The Arizona Legislature has recognized this method of sale by passing an Act relieving the purchaser against unconscionable forfeiture by providing a period of default necessary before such forfeiture can be enforced. *Paragraph 2781, Revised Code of Arizona, 1928,* provides:

> "A forfeiture of the interest of the purchaser in default under a contract for the conveyance of real property may be enforced only after the expiration, after such default, of the following periods: Where the purchaser has paid less than

> twenty per cent of the purchase price, thirty days; where the purchaser has paid twenty per cent, or more, but less than thirty per cent, of the purchase price, sixty days, etc."

Under a contract and escrow, such as the one involved in this suit, title to the property does not pass until delivery out of escrow.

> "The general rule is that the instrument deposited does not become a deed and operate to convey the title until the second delivery, or, perhaps, more accurately speaking, until the performance of its conditions."
> *Foulkes vs. Sengstaken 83 (Ore.), 118, 163 Pac. 311, at Page 314.*

This is the rule in Arizona:

> "As we understand the defendant, he in effect, contends the transaction as it is described in the writing, was a sale of the ranch property by plaintiff to him. But that cannot be, since a sale imports an actual transfer of title from the grantor to the grantee. Here the deed of conveyance was placed, as the agreement provided it should be, in escrow along with the agreement, with the understanding that the escrow keeper should not deliver it to the grantee until his notes were paid. There was therefore only an agreement to sell the premises or a contract to be performed in the future, which in its very

nature might not have been completed because of breaches, or recisions, or releases, that might occur.

Lewis vs. Rouse, 29 Ariz. 156, 240 Pac. 275, at Page 276.

"The deed which she and her husband executed to Dameron had not been delivered when she died but was held in escrow, and consequently the legal title had not passed to him but remained in Mollie Potts Kennedy (grantor) during her lifetime as security for the unpaid purchase price and at her death went to Mrs. Snow." *Snow vs. Kennedy, 36 Ariz. 475, 286 Pac. 930, at Page 932.*

The legal title not having passed to the Wallaces under the escrow contract, there was no title in them which could be mortgaged or upon which a mortgage could be imposed by a court of equity.

In *American Mtg. Co. vs. Logan, 90 Colo. 157, 7 Pac. (2) 953, at Page 954,* the mortgage company purchased a tract of land from the Logans under a contract of sale similar in effect to the contract of sale in the case at bar. The mortgage company contended that the contract created a mortgage and must be foreclosed as such; the Court says:

"The contention of the mortgage company is that the transaction created between the mort-

gage company and the Logans the relation of mortgagor and mortgagees, and therefore that, in order to foreclose the company's rights, there must be a judicial foreclosure as in the case of mortgages, with the accompanying statutory right of redemption. With that contention we do not agree."

Continuing, the Court holds that there can be no mortgage unless the mortgagor has some real estate to pledge, in the following language, found on *page 954:*

"It is next argued that the contract must be treated as an equitable mortgage, but there can be no mortgage of any kind unless the mortgagor has some real estate to pledge. This the defendant did not have. Whatever rights, either legal or equitable, he had in the land did not affect the contract in question in its character as an agreement to purchase. Being such an agreement, the plaintiff had the right to proceed under the unlawful detainer act."

SEE ALSO: *Schiffiner vs. Chicago T. & T. Co., 79 Colo. 249, 244 Pac. 1012;*

A conveyance in escrow is not a mortgage:

"The defendant expressly pleaded that it was an escrow; and hence there can be no room for

the contention that the instrument should be treated as a mortgage."

Foulkes vs. Sengstaken, supra, at Page 314.

Under an escrow contract the vendor does not have a lien for the purchase price. His security is the title to the land. In *Snow vs. Kennedy, supra*, property was contracted to be sold by deeds in escrow such as in the case at bar; the Arizona Supreme Court *on page 933*, adopts the rule stated in *Pomeroy's Equity Jurisprudence (3d Ed.), Sec. 1260*, as follows:

> " * * * the vendor of real estate before conveyance, 'although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, * * * retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure—namely, by paying the price according to the terms of the contract. * * * In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer to or with a bona fide purchaser.' "

The only case cited by appellant in support of his

contention that the escrow contract here involved, constituted an equitable mortgage, is *Nixon vs. Marr, 190 Fed. 913.* That case is decided upon the theory that the retention of the legal title by the vendor was merely as security, and that he was entitled to treat the contract as a mortgage. The opinion cites *Smith vs. Kirchener, 7 Okla. 166, 54 Pac. 439,* and *Lewis vs. Hawkins, 23 Wall. 119, 23 Law Ed. 113,* as authority. Both of these cases involve title bonds. A different rule applies in the case of a title bond than does in the case of an ordinary contract of sale in escrow. There is a dissenting opinion is the case by Justice Sanborn following the rule announced in the above cases. The rule which prevails in Arizona.

Appellant asserts on pages 33 and 34 of his brief that the deposit of title papers has always been, even in England, regarded as creating an equitable mortgage. Here the facts do not constitute a deposit of title papers. Under the doctrine that the deposit of title papers creates an equitable lien upon the title of the borrower, the title papers referred to are unrecorded documents by which the borrower obtains title. In this case it would be unrecorded deeds by which the Two Republics Life Insurance Company and the Mississippi Valley Life Insurance Company obtained title to the property in question. It does not refer to the deed executed by the borrower to the escrow purchaser.

However, this doctrine does not prevail in Arizona and only prevails in a few of the far eastern states.

"It is a rule of long standing in England that an equitable mortgage on land is created by the mere deposit of title deeds as security for a debt. This rule grew out of the fact that there was no general system of registration in that country and the system of conveyancing rendered it necessary to have possession of the muniments title. In the United States a few courts seem to have accepted the English doctrine but it is rejected in most jurisdictions as having been superseded by the system of registration of land titles which prevails in this country."

19 R. C. L. 277, Section 48.

SEE ALSO: *41 C. J. 309, Sec. 62.*

Aside from this, the contract and deeds were not deposited with the Insurance Department of the State of New Mexico in trust, as contended by appellant. They were deposited in escrow. The Insurance Department was merely agent for the vendor and vendees. The Insurance Department had no control or authority over the documents other thas to deliver them to the vendees in case of full payment of the purchase price or to redeliver them to the vendor in case of default in payment of the purchase price.

If it be appellant's theory that the assignment constituted an equitable mortgage, that theory is equally untenable.

In the first place the vendor not having a lien or right to a lien upon the property as security for the payment of the purchase price, it could not assign something it did not have, and in the second place, the assignments do not purport to impress a lien upon the land itself.

The assignments under which appellant asserts title to the alleged securities and his right to maintais this suit, is one from the Two Republics Life Insurance Company to the State of New Mexico, described in Paragraph VII of the Complaint (Tr. 32), and set forth in "Exhibit F" (Tr. 62), and one from the Mississippi Valley Life Insurance Company to the State of New Mexico described in Paragraph XIV of the Complaint (Tr. 36) and attached to the complaint as Exhibit"J" (Tr. 75).

These assignments make no reference whatsoever to the land but only refer to the purchase price to be paid for the land. The interest of the Two Republics Life Insurance Company and the Mississippi Valley Life Insurance Company in the land itself was not assigned or conveyed, and there is nothing in the wording of the assignments from which it can be inferred that it was the intention of the assignors to create or to assign to the State of New Mexico a lien upon the land itself. The assignment refers to the purchase price payments only.

While it is true that no precise legal terminology is required to enable a court of equity to impress an

equitable lien against property, it is always an essential that the instrument show it was the intention of the parties to give a security for a debt or obligation upon *some particular property.*

In *New Orleans Nat. Bank vs. Adams, 109 U. S. 211, at Page 214, 27 Law Ed. at Page 911* it is said:

> "While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge *his land* for the payment of a sum of money, or the performance of some act, or it cannot be construed to be a mortgage."

In *Smith vs. Rainey, 9 Ariz. 362, 83 Pac. 463, at Page 464,* it is said:

> "The intention must be to create a lien upon the *property,* as distinguished from an agreement to apply the proceeds from the sale of it to the payment of the debt."

In *Vaniman vs. Gardner, 99 Ill. App. 345, at page 348,* it is said:

> "While, as a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a *charge upon the prop-*

erty, will constitute an equitable mortgage and may be enforced as such in a court of equity, yet a mere promise to pay out of the proceeds of the sale of the property is not sufficient to create an equitable mortgage upon the property itself."

SEE ALSO: *Barber vs. Toomey, 67 Ore. 452, 136 Pac. 343, at Page 346.*

And the intention must be ascertained from the terms of the instrument itself:

"For the purpose of ascertaining the intention of the parties, resort must be had, first, to the instrument itself."

Stephen vs. Patterson, 21 Ariz. 308, 188 Pac. 131, at Page 132;

"Can parol testimony be admitted to aid Wadgymar's imperfect agreement and make a mortgage of it? We think not. That would be in violation of the statute of conveyances, and would be creating an incumbrance upon real property by verbal testimony. It would be also objectionable as adding to and varying the written agreement of the parties by parol. It would be virtually to make a contract for them. This undertaking does not upon its face create a mortgage upon real property."

Boehl vs. Wadgymar, 54 Tex. 589, at Page 592.

SEE ALSO: *Hibernian Bank vs. Davis, 295 Ill. 537, 129 N. E. 540.*

The customary method, and the only method with which we are familiar, by which a vendor in an escrow contract can secure a debt of his own by the land specified in the contract, is for the vendor to give a mortgage upon the land, subject to the rights of the escrow purchaser, or to place a deed in escrow from the vendor to his assignee of the contract, transfering title to the assignee in case the purchaser defaults in the payment of the purchase price. If it had been the intention of the Two Republics Life Insurance Company to give the security of the land itself, to the State of New Mexico, one of these methods would have been followed.

In *Baum vs. Grigsby, 21 Cal. 172, at page 177,* the Court says:

> "There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase money. He can assign his contract *with the conveyance of the title,* and in such case his assignee will acquire the same rights and be subject to the same liabilities as himself."

The case of *Jackson vs. Wenk, 224 Mich. 578, 194 N. W. 1000,* is one in which Wenk purchased from

Goetz by an executory contract of sale a tract of land; the Court says:

> "Wenk had but a contingent equitable interest in the property, subject to cancellation for default in performance on his part at any time until he paid the contract price in full. Only by Goetz *conveying the property and assigning the contract* to Jackson could Jackson become owner of the contract with the power to perform or enforce it."

On page 40 of appellant's brief it is stated that, in the court below in which the case at bar was tried, an identical contract with the one at bar was foreclosed as a mortgage. Appellant is in error in this. The case referred to involved a deed given as security for a debt and which was construed to be a mortgage and foreclosed as such. We know of no case in Arizona where a contract of sale, such as the one at bar, has been construed to be a mortgage, equitable or otherwise, and foreclosed as such.

FIFTH ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the

State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928.

ARGUMENT

Under appellant's Fifth Assignment of Error three propositions are raised; First, that the bar of the statute is not available because the appellee Republic Life Insurance Company of Dallas, Texas, and appellee, J. G. Vaughn, are nonresidents of the State of Arizona; second, that the facts in the case at bar raise a trust and that the statute does not run in favor of a trust; and third, that the cause of action did not accrue until the County Court of Santa Fe County, New Mexico, made its finding that a suit to foreclose was necessary.

As to the right of a foreign corporation to plead the statute of limitations, the decisions are not uniform. The rule followed in the cases cited by appellent is to the effect that a foreign corporation which has not qualified to do business within the state cannot plead the statute in any event. The majority rule is that if the corporation has an agent in the state upon whom service of process can be made, the statute is available. *Fletcher Cyc. Corp., Permanent Ed., Vol. 18, Page 245, Sec. 8676.* The matter has not been passed upon by the Supreme Court of Arizona.

The reason for the majority rule is stated in *Fletcher Cyc. Corp., Permanent Ed., Vol. 18, Page 253, Sec. 8676,* as follows:

> "The reason for the majority rule that absence from the state and residence out of the state, in the sense of a statute providing that if the person against whom a cause action has accrued shall be absent from or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limiting the commencement of the action, means such absence and such nonresidence as renders it impracticable at all times to obtain service of process, so that while a corporation's technical legal residence may be where it was created, the residence and status for purposes of suit will be where it can through its officers and agents be reached by process."

As we understand the foregoing statement, the only purpose of the rule is that a creditor shall not be deprived of his right to sue and foreclose by reason of inability to obtain service upon the debtor. If the creditor is not deprived of this right, the reason for the rule fails. In all the cases which we have examined in which a foreign corporation has been denied the right to plead the statute, the foreign corporation has been the debtor. In such case the creditor would be deprived of his remedy of obtaining a personal judgment by reason of his inability to obtain personal service.

In the case at bar the Wallaces (the alleged debtors under the escrow contract) were at all times residents of Arizona. The appellee, Republic Life Insurance Company, and the appellee, J. G. Vaughn, were in nowise obligated under the contract and the only necessity of their being made parties is that they obtained an interest in the property subsequent to the date of the alleged equitable mortgage. The Wallaces have been amenable to personal service at all times and the Republic Life Insurance Company and Vaughn have been amenable to substituted service which is sufficient to test their rights to the property if, as alleged by appellant, their rights are subject and subordinate to the appellant's alleged lien.

We have searched diligently but have not been able to find a case in which this point has been directly raised, but it seems to us that inasmuch as appellees absence from the state did not deny the right of suit and the obtaining of full relief, that the rule depriving them of the right to interpose the statute should not apply.

It is stated in *City of St. Paul vs. Chicago M. & St. Ry. Co. (Minn.), 48 N. W. 17, at page 21:*

> "The purpose of the statute of limitations in allowing specified times for commencing actions and in making exceptions to the running of such times, is a practical one. It is to give the plaintiff what the legislature deemed a reasonable

opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in anyway a full and complete remedy for the time specified, can have been intended by Section 15."

There is no question but that Wallaces could have pleaded the statute if they wished to, and there is no question that if an original debtor or mortgagor fails to plead the statute that a subsequent purchaser of the property may do so. *Sanger vs. Nightingale, 122 U. S. 176; Ewell vs. Daggs, 108 U. S. 143; Graves vs. Seifried (Utah), 87 Pac. 674; 37 C. J. 718, Sec. 33.*

In the case at bar the appellee, M. J. Dougherty, was at all times a resident and citizen of the State of Arizona (Tr. 28) and there is no question as to his right to plead the statute.

Second, the relation of trustee does not exist. As we have hereinbefore shown, title under the contract of purchase remained in the vendor. The circumstances were not such as existed in the case of *Lewis vs. Hawkins, 90 U. S. 119, 23 Law Ed. 113*, cited by appellant. In that case a title bond was given by the vendor and in such case the vendor holds the title in trust for the vendee and the vendee is trustee for the vendor as to the purchase price.

Third, the cases cited by appellant in support of his contention that a cause of action did not arise under the contract until the Judge of the County

Court of Santa Fe County, New Mexico, made his determination that it was necessary to sue, are all on stockholders' liability. In such case, of course there is no cause of action until the Court or the proper authority has determined that a stockholders' assessment is necessary and fixes the amount thereof. Such is not the case here however. Here, installment payments became due and payable under the contract from January, 1924. The last installment was due and payable in January, 1928. The determination by the County Court of Santa Fe County, New Mexico, made in February, 1937, that it was necessary to sue on the contract could not in anywise affect the running of the statute as against the payments.

Further than this, under the rule announced in *Hobbs vs. Occidental Life Insurance Co., supra,* upon the insolvency of the National Life Insurance Company of the Southwest the policies of that company were terminated as enforcible obligations for their respective amounts and policyholders became creditors each for an amount equal to the then value of his policy. The right of action against these securities accrued at that time and the statute of limitations would begin to run at that time. The liability to which the securities could be subjected could have readily been ascertained at the time of the insolvency of the National Life Insurance Company of the Southwest by computing the then value of the outstanding policies in New Mexico at that time or if it could

not be determined at that time, it certainly could have been determined at the time the Mississippi Valley Life Insurance Company became insolvent in 1932, and the Republic Life Insurance Company of Dallas, Texas, entered into the agreement with the Receivers of the Mississippi Valley Life Insurance Company reinsuring the policies of the National Life Insurance Company of the Southwest.

Appellant asserts that the Superintendent of Insurance was not guilty of laches. It appears to us that he was guilty of gross and inexcusable laches. The complaint does not disclose when the policies of the National Life Insurance Company of the Southwest were registered, but it does show (Paragraph VI, Tr. 30) that the Two Republics Life Insurance Company took over the assets of the company and assumed its policy obligations prior to the year, 1923. The complaint further shows that the Two Republics Life Insurance Company assigned the purchase price payments under the Wallace contract on April 5, 1923 as security for the registered policyholders of the National Life Insurance Company of the Southwest (Paragraph VIII, Tr. 32). These payments became due $1,000.00 January 16, 1924, $1,000.00 January 16, 1925, $1,500.00 January 16, 1926, $1,500.00 January 16, 1927, and $27,255.00 January 16, 1928 (Tr. 56). Only the first two payments were made; $1,000.00 in 1924 and $1,000.00 in 1925 (Tr. 90.) No action was taken by the Superintendent until this suit was filed on March 22, 1937.

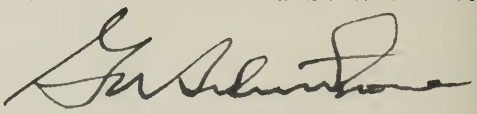
We can assume that no interest or rents, or profits, were collected by the Superintendent of Insurance as it is stated on page 41 of appellant's brief that neither the superintendent or the receiver was entitled to receive the interest or rents or profits. The Suprintendent of Insurance must have known that these purchase price payments and interest were not being made to the Two Republics Life Insurance Company or to the Mississippi Valley Life Insurance Company for they had no right to collect them by reason of their assignment.

On May 18, 1932 the appellee, Republic Life Insurance Company, reinsured and assumed the liabilities under the policies issued by the National Life Insurance Company of the Southwest, the Two Republics Life Insurance Company, and the Mississippi Valley Life Insurance Company, and in consideration thereof obtained an interest in the securities assigned to the State of New Mexico, including the Wallace escrow agreement (Tr. 37). Banta quieted title to the land in August of 1932 and a deed from the Receiver to Banta was duly recorded (Paragraph VII, Tr. 38). Mrs. Wallace deeded her equity in the land on September 22, 1932 to Banta, which deed was also recorded. The recording of these instruments was constructive notice to the Superintendent of Insurance.

During the period of twelve years from the time the last payment was made under the contract to the bringing of the suit, and despite the fact that the last payment became due in 1928, no action was taken

by the Superintendent of Insurance, either to tender the securities back to the Two Republics Life Insurance Company, or the Mississippi Valley Life Insurance Company, or the Republic Life Insurance Company, and demand new securities in lieu thereof, or to proceed for the collection of the payments of purchase price assigned. Such a state of facts does not import such diligence as required in equity.

We respectfully submit that for the reasons shown, the judgment of the lower court dismissing the Bill of Complaint was correct and should be affirmed.



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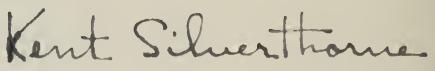

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